

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LAURA E. TAYLOR,

Plaintiff-Appellant,

v

DAVID E. TAYLOR,

Defendant-Appellee.

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UNPUBLISHED

July 29, 2008

No. 281555

Oakland Circuit Court

Family Division

LC No. 2003-675784-DM

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Plaintiff, Laura Taylor, appeals as of right the trial court's order granting defendant, David Taylor's, motion to have the divorced couple's minor child, Rebecca,<sup>1</sup> placed in public school rather than continue to be home schooled. Because plaintiff has not shown that relief is warranted regarding the trial court's use of an improper evidence standard, because plaintiff is precluded from challenging the trial court's decision not to consider all of the best interest factors, and because the trial court's findings of fact were not against the great weight of the evidence and its order was not an abuse of discretion, we affirm.

I

On November 20, 2003, a Judgment of Divorce was entered awarding joint legal custody of Rebecca to plaintiff and defendant. The Judgment of Divorce states, in accordance with the parties' agreement to joint legal custody, "[t]hat the parties shall consult together concerning major policy decisions involving the health, education and welfare of the child." Following entry of the Judgment of Divorce, plaintiff and Rebecca moved into plaintiff's parents' home. Rebecca spends alternating weekends with defendant.

In January 2003, plaintiff enrolled Rebecca in preschool. But the day before the first day of class, plaintiff withdrew Rebecca's enrollment and instead chose to home school the child. Defendant did not agree and in fact objected to plaintiff home schooling Rebecca for preschool.

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<sup>1</sup> Rebecca was born on December 4, 2000.

The following year, the parties disagreed about Rebecca's kindergarten education that was to begin in late summer 2006. Defendant testified that he was aware plaintiff intended to continue home schooling Rebecca for kindergarten but wanted Rebecca enrolled in public school for kindergarten. Defendant stated that he talked to plaintiff on the phone regarding enrollment, emailed, and dropped off public school enrollment materials to plaintiff during summer 2006. On August 15, 2006, defendant received an email from plaintiff stating that she was going to home school Rebecca for kindergarten and would begin shortly. Despite plaintiff's email, defendant enrolled Rebecca in a public school in September 2006. Rebecca attended the school for two days before plaintiff pulled her out of the school to proceed with home schooling.

On August 28, 2006, defendant filed a motion with the trial court seeking an order requiring Rebecca to be enrolled in Beverly Elementary School in Beverly Hills, Michigan, for kindergarten. Observing that education in Michigan is not mandated until a child reaches the first grade, the trial court refrained from acting on defendant's motion and instead scheduled an evidentiary hearing for June 25, 2007, in order to address the issue prior to Rebecca's start of first grade.

The trial court conducted a three-day evidentiary hearing in the Summer 2007. At the opening of the initial hearing, defendant indicated that the trial court should review all of the best interest factors, as provided in MCL 722.23, in determining whether Rebecca should attend public school. Plaintiff, however, asserted that it was not necessary to look at all of the best interest factors as only certain factors related to education. During defendant's testimony, plaintiff objected when counsel initiated a discussion of particular best interest factors, again stating that the factors were not relevant to the determination of how to best educate the child. The trial court allowed defendant to testify regarding certain factors but prevented testimony regarding other factors.

Plaintiff testified that she and her mother, Priscilla Lohrengel, a retired teacher, home school Rebecca with the assistance of SonLight Curriculum, a religious based curriculum. Rebecca is also a part of a home schooling association that unites home-schooled children for social activities. Plaintiff presented the testimony of Debra Pierce to establish that Rebecca was succeeding academically under the home school curriculum. According to Pierce, a first grade teacher at Our Shepard Lutheran School who conducted a series of academic tests on Rebecca when she was in kindergarten, Rebecca had the skills of a first grader prior to entering that level of schooling. Defendant presented the testimony of Jennifer Martella, principal of Beverly Elementary School, to establish that Beverly Elementary School is well suited to educating children of divorced parents.

Plaintiff and defendant both testified at the evidentiary hearing. It was defendant's position that home schooling was not in Rebecca's best interests due to the lack of socialization and because plaintiff has no formal training as an educator. Plaintiff testified that she was opposed to public school because it lacks any religious aspects. Both parties testified extensively regarding the lack of cooperation in their relationship and their inability to communicate with each other. Each party blamed the other for repeated communication breakdowns. While Rebecca was being home schooled, the parties dispute the lengths to which plaintiff went to involve defendant in Rebecca's education. Defendant acknowledges that despite plaintiff's invitation, he has chosen not to review Rebecca's home school curriculum. Though he testified that he was unable to participate in Rebecca's education because plaintiff has not invited him to

any home school activities. Plaintiff testified that defendant refuses to communicate or cooperate in regard to Rebecca's home schooling, but admitted that she never invited defendant to any of Rebecca's home school activities.

At the close of the evidentiary hearing, the trial court determined that Rebecca would be best served attending public school for first grade. At the outset of its holding the trial court found that the evidence showed the communication between the parties was so strained and lacking that it qualified as "no communication." The trial court then stated that not all of the best interest factors applied and that it would discuss those that it determined to be relevant. In analyzing the factors, the trial court stated that factor a, MCL 722.23(a), the love and affection for the child, did not favor either party. Factor b, MCL 722.23(b), the capacity of the parties to provide love affection and guidance, did not favor either of the parties. The trial court began to discuss factor c, MCL 722.23(c), the capacity of the parties to provide food clothing and medical care for the child, but then moved on before concluding whether the factor favored plaintiff or defendant. In reference to factor d, MCL 722.23(d), the time that the child has lived in a stable environment and desirability of continuity, the trial court stated that it appeared that Rebecca's environment was stable, but did not explicitly state that the factor favored plaintiff. In discussing factor e, MCL 722.23(e), the permanence as a family unit of the existing custodial home, the trial court noted that plaintiff was planning on adopting a child from China, but stated that it was unclear whether that addition to the family unit would have a positive or negative affect. The trial court determined that factor f, MCL 722.23(f), the moral fitness of the parties, was not relevant to the issue of education. Similarly, the trial court concluded that factor g, MCL 722.23(g), the mental and physical health of the parties, was not relevant. The trial court stated, in regard to factor h, MCL 722.23(h), the home, school and community record of the child, that Rebecca appeared to be capable of succeeding in any environment, indicating that the factor did not favor either party. The trial court did not address factor i, MCL 722.23(i), the reasonable preference of the child. The trial court primarily focused on factor j, MCL 722.23(j), the willingness and ability of the parties to encourage a close relationship between the child and the parents stating specifically that it was the "lynch pin" in the matter. In discussing factor j, the trial court strongly emphasized the fact that the evidence clearly displayed the parties' near complete inability to communicate. The trial court then found that, as a direct result of the lack of communication between the parties, if plaintiff continued home schooling Rebecca, defendant would have no involvement in Rebecca's educational decision-making and would essentially have no ability to keep track of her progress. The trial court did not discuss factor k, MCL 722.23(k), domestic violence, nor did the trial court discuss any additional factors, as permitted by MCL 722.23(l). The trial court granted defendant's motion in a written order on September 11, 2007. This appeal followed.

## II

As this Court has previously stated:

[This Court] appl[ies] three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of

law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003) (internal citations omitted).]

### III

Plaintiff first argues that the trial court erred in not determining the applicable burden of proof in this case. The trial court and the parties never discussed the applicable burden of proof. However, after reviewing the record, it appears that the trial court applied a preponderance of the evidence standard because it essentially treated the parties as if they stood on equal footing at the hearing despite the fact that the hearing was the product of defendant's motion. But we conclude that, while the trial court erred in applying a preponderance of the evidence standard, no relief is warranted because the record establishes that even if the trial court had correctly applied the clear and convincing evidence standard, the trial court would have reached the same outcome.

This Court has previously addressed the proper burden of proof to apply when joint legal custodians of a child disagree regarding the educational future of that child. In *Lombardo v Lombardo*, 202 Mich App 151, 153; 507 NW2d 788 (1993), the plaintiff brought a motion seeking to have her son enrolled in a program for gifted children. *Id.* at 153. The defendant, the child's father, had physical custody of the child though the parents had joint legal custody. *Id.* The trial court determined that the child was in an established educational environment and concluded that the parent with physical custody of the child, the defendant, should make the decision regarding education. *Id.* at 153-154. In vacating the trial court's order and remanding, this Court did not address the validity of the concept of an established educational environment. However, *Lombardo* did indicate that where a lower court makes a determination regarding the education of a child, it is appropriate to apply the clear and convincing evidence standard. *Id.* at 159. The Court in *Lombardo* reached this determination without referencing whether an established custodial environment existed, indicating the clear and convincing standard applies to all disputes regarding education where the parties have joint legal custody. Specifically, the *Lombardo* Court stated:

We believe the trial court in this case clearly erred in determining that the parent who is the primary physical custodian has the authority to resolve any disputes concerning the important decisions affecting the welfare of the children. MCL 722.27(1)(c) . . . , provides that a court shall change a previous custody order only if there is clear and convincing evidence that it is in the best interests of the children. In allowing the primary physical custodian to resolve the important disputes, a trial court might tacitly violate § 7 of the Child Custody Act. [*Id.*]

*Lombardo* establishes that the trial court should have applied the clear and convincing evidence standard. As such, the trial court here committed clear legal error when it selected and utilized the preponderance of the evidence standard. However, plaintiff has not demonstrated that the result of the proceeding would have been different had the trial court applied the more stringent burden of proof, nor has plaintiff established how the trial court's failure to explicitly declare the applicable burden of proof affected the outcome of the proceeding. Our review of the record indicates that the trial court concluded the parties exhibited a complete inability to communicate with one another. As a result, should plaintiff continue to home school Rebecca,

defendant would have little to no involvement in Rebecca's education and that was not in Rebecca's best interest. Even if the trial court applied the clear and convincing standard, we are certain that the same outcome would have resulted because the evidence of the lack of communication was so overwhelming. Plaintiff is not entitled to relief on this issue.

#### IV

Plaintiff next contends that the trial court erred in not considering each of the best interest factors listed in MCL 722.23 prior to deciding that Rebecca should attend public school. At the evidentiary hearing, plaintiff stated several times that only certain best interest factors were relevant to the issue of education and that it was unnecessary for the court to consider all the factors. "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Michigan/Wisconsin, Inc*, 272 Mich App 142, 148; 724 NW2d 498 (2006). Plaintiff is precluded from asserting the trial court erred in not considering all of the best interest factors for the reason that the trial court's analysis was the product of plaintiff's own request.

#### V

Plaintiff next contends that the trial court's factual findings relating to best interest factors b, d, h, and j were against the great weight of the evidence and that its resulting order that home schooling was not in Rebecca's best interest was an abuse of its discretion. Defendant counters that the trial court properly determined that factors b, d, and h did not favor either of the parties, and in regard to factor j, the evidence demonstrated that neither party was able to communicate with the other resulting in home schooling not being in Rebecca's best interest, therefore the trial court did not abuse its discretion.

#### A.

Factor b, MCL 723.23(b), relates to the capacity of each party to love the child and to continue to raise the child in her religious creed. Plaintiff asserts that the trial court erred in determining that the factor did not favor either party. According to plaintiff, because the curriculum for the home schooling was religious based, Rebecca will now be at a disadvantage in her spiritual development because she will not be able to receive a religious education at Beverly Elementary School. However, the testimony demonstrated that both plaintiff and defendant were committed to raising Rebecca in the Lutheran church. Rebecca regularly attends church services and functions. There is no indication that her spiritual development will be seriously ill affected or cease as a result of the trial court's holding. The trial court properly determined that this factor did not favor either party.

#### B.

Plaintiff next contends that the trial court erred in concluding that factor d, MCL 723.23(d), which relates to the length of time the child has lived in a stable environment, did not favor either party. Plaintiff asserts that the factor favored the continuation of home schooling because Rebecca had been home schooled in a stable environment for the previous two years. We conclude that the trial court did not err in determining that factor d did not favor either party because it does not appear that the stability of Rebecca's home life will be affected by her

educational setting. In arguing that the factor favors plaintiff, plaintiff essentially transforms factor d from a factor about home life to a factor about schooling. Because educational environment is addressed in factor h, as discussed below, such an analysis of factor d is improper. The trial court did not err in holding that factor d favored neither party.

C.

Plaintiff also asserts the trial court erred in concluding factor h, MCL 723.23(h), which concerns the home, school, and community record of the child, did not favor either party. Plaintiff contends that because the evidence demonstrated Rebecca excelled in the home school setting, factor h favored leaving her in that setting. But the testimony of Martella established that Beverly Elementary School is a highly regarded institution capable of educating children from divorced parents. The record shows that Rebecca was above her grade level and is a very bright child, and does not support the notion that Rebecca will be less successful in the public school environment. The trial court's finding regarding this factor was not against the great weight of the evidence.

D.

Plaintiff asserts that the trial court erred when evaluating factor j, MCL 723.23(j), because it held plaintiff partly responsible for the communication problems between the parties. Plaintiff alleges that she made frequent attempts to communicate with defendant only to be rebuffed and established that Rebecca was excelling under the home school program. Plaintiff argues that the trial court misconstrued the evidence and injected its own bias against home schooling when it made its decision and therefore abused its discretion.

Defendant responds that in regard to factor j, the evidence clearly demonstrated that neither party was able to communicate with the other and the testimony established that Beverly Elementary School was well equipped to educate a child of divorced parents and was accustomed to making certain accommodations that so that each parent was informed about their child's progress and development. Defendant argues that based on the evidence, the trial court properly found that because the parties were unable to communicate with each other, continuing home schooling would not be in Rebecca's best interest because it would prevent defendant from being involved in her education. And in contrast, Rebecca's attendance at public school would allow each parent to be involved in Rebecca's development that would be in Rebecca's best interest.

MCL 723.23(j) states as follows:

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

At the evidentiary hearing, the trial court heard the testimony of both parties. Both plaintiff and defendant blamed one another for the breakdown in communication in their relationship. While Rebecca was being home schooled, the parties dispute the lengths to which plaintiff went to involve defendant. Plaintiff contended that she sought to involve defendant in Rebecca's home school activities, but acknowledged that she did not inform him when Rebecca would be

attending any of the activities. Similarly, while defendant claimed he was denied the opportunity to be involved in Rebecca's education, the evidence established that he refused the opportunity to review the curriculum plaintiff chose to utilize.

After reviewing the record we conclude that the trial court properly determined that there was a disturbing lack of communication between plaintiff and defendant and that each party was responsible. The trial court specifically found that as a result of the communication issues, the parties "are not willing to set aside their differences and discuss what is important to them, which is their child." The record reflects that the trial court assessed the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents as required under MCL 722.23(j), and reached a conclusion based on the facts presented. The facts do not clearly preponderate in the direction opposite to that espoused by the trial court. *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2007). Thus we find no error in the trial court's conclusion that factor j did not favor either party because each party demonstrated an inability to maintain productive communication with the other party to the detriment of Rebecca.

Based on its factual conclusions relating to MCL 722.23(j) the trial court made the discretionary determination that attending public school would be in Rebecca's best interest. Normally, an abuse of discretion standard applies to the trial court's discretionary rulings regarding custody decisions. *Vodvarka, supra* at 507-508. However, as discussed above, *Lombardo* counseled that in matters where the parties have joint legal custody of a child and a lower court makes a determination regarding the education of the child, it is appropriate to apply the clear and convincing evidence standard. *Lombardo, supra* at 159. The clear and convincing evidence standard is "the most demanding standard applied in civil cases." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Our Supreme Court has described clear and convincing evidence as proof that

produce(s) in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable (the factfinder) to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Id.* (internal quotation omitted).]

The record established that the trial court found that the evidence relating to factor j was so overwhelming that it showed that the communication between the parties was so poor that it described the communication as "no communication." The trial court held that instead of attempting to engage in meaningful discussions regarding Rebecca's education, the evidence showed that the parties were not willing to set aside their differences as divorced individuals and believed the other person was trying to exert control over the situation to Rebecca's detriment. While the trial court made it clear in its ruling that both parties were equally responsible for the state of affairs in their parenting relationship, the trial court held, and we agree, that clear and convincing evidence established that the ultimate effect of the parties' inability to communicate was the excising of defendant completely from Rebecca's education if she was to continue with home schooling. Defendant's absence from decisions relating to Rebecca's education and her educational development directly affect her overall welfare and development and is not in her best interests. The trial court did not err.

E.

Plaintiff asserts that the alleged errors in the trial court's factual findings, when combined with the court's bias against home schooling, resulted in its determination that Rebecca should go to public school and that the determination amounts to an abuse of discretion. While the trial court did make several statements indicating that it had a general preference not to home school children, these statements were made after the trial court stated that the inability of the parties to communicate warranted the end of home schooling. The trial court expressed a clear preference to have both parents involved in Rebecca's education and correctly concluded that the evidence established defendant would not be involved so long as Rebecca was home schooled. The trial court's decision to place Rebecca in public school was not based on a bias against home school, but rather, was based on the particular facts and circumstances of this specific case. Because the trial court's factual findings were not against the great weight of the evidence, and because its grant of defendant's motion was the result of its determination that public school was in the best interest of Rebecca rather than the result of a bias against home schooling, the trial court did not abuse its discretion.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot  
/s/ Pat M. Donofrio